89-1063

Supreme Court, U.S.
FILED
DEC 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JACK S. DAWSON, ESQ. #2235
Attorney of Record
JANICE M. DANSBY, ESQ. #2155
MILLER, DOLLARHIDE, DAWSON & SHAW
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the trial court's announcement of its decision granting Defendant's Motion for Summary Judgment, thereby disposing of Plaintiff's entire case, but reserving the right to enter judgment and findings of fact and conclusions of law, constitutes the announcement of a final decision within the meaning of Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(2).

2. If the answer to Question No. 1 is in the negative, whether a premature notice of appeal may be considered as if taken from a subsequently entered final order, absent prejudice to appellees.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1-2) is not reported. The opinion of the district court is reported at 708 F.Supp. 1224 (W.D. Okla. 1989).

JURISDICTION

The judgment of the court of appeals (App. A, infra, 1-2) was entered on September 26, 1989. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED

1. Title 28 U.S.C.S. §1291 provides:
   Final decisions of district courts

   The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from

all final decisions of the district courts of the United States, the United States District Court or the District Court of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in §§1292(c) and (d) and 1295 of this title.

2. Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(2) provides:

> Appeal as of Right - When Taken
> (a) Appeals in Civil Cases.
>
> . . . .
>
> (2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

STATEMENT

FirsTier Mortgage Company, a/k/a Realbanc, Inc. ("FirsTier")[1] sued Investors Mortgage Insurance Company ("IMI") for bad faith refusal to honor eight private mortgage insurance policies and for punitive damages. IMI moved for summary judgment. On January 26, 1989, the trial court heard arguments on Defendant's Motion for Summary Judgment. The court announced its finding that all of the subject insurance policies

[1] FirsTier Mortgage Company's parent companies and subsidiaries are: FirsTier Financial, Inc.; FirsTier Bank, N.A., Omaha; FirsTier Bank, N.A., Lincoln; FirsTier Data Services, Inc.; FirsTier Leasing Co.; LeaseBanc Financial Corp.; FirsTier Services, Inc.; Asset Recovery Co.; DeLay First National Bank & Trust Co. of Norfolk; and FirsTier Brokerage Co.

were void for fraud, and that Plaintiff's claim for punitive damages was moot. The court thereby disposed of Plaintiff's entire complaint.

We obtained a transcript of the court's decision as announced from the bench at that hearing. (App. C.) The court said, *inter alia:*

> I find that the policies *should be and are cancelled* as void for want of [sic] fraud, bad faith. The *Court has heard no evidence in the matter of this hearing to change its mind from holding that the policies are void.*
>
> Of course, in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit.
>
> The Court does find that they relied on the package in each of these loans and that the package was not honest. In fact, it was dishonest. The dishonesty should and does void the policy.
>
> Now, Mr. Gray, the Court will ask you to submit suggested findings of fact and conclusions as to each one of these loans, citing the evidence that you rely on and where it can be located. The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court will then modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about. (App. C, 15.)
>
> . . . .
>
> MR. GRAY: May I assume that the bad faith claim, which was the other cause of action, is also moot at this point?

> MR. DAWSON: I would agree with counsel that if this action is dismissed, then the bad faith action must be dismissed along with it. I don't agree that it should be, but I agree with him in his legal interpretation that with this ruling, that this ruling would force the court to do that.
>
> THE COURT: *That will be the ruling.* (App. C., 16-17, emphasis supplied.)

It is clear to us from a reading of the transcript and a review of the record below that the court and counsel for both parties treated the judge's announcement from the bench as a final decision.[2] The only thing that remained to be done was for the court to memorialize its decision in an order, with findings of fact and conclusions of law.

On March 3, 1989, the trial court entered its Order and Judgment and Memorandum Opinion, with findings of fact and conclusions of law. The Order and Judgment rendered judgment in favor of the Defendant and against the Plaintiff. (App. D, E.) A copy of the docket sheet reflecting the entry of the trial court's Order and Judgment and Memorandum Opinion is attached hereto (App. F.).

Pursuant to F.R.A.P. 4(a)(2), FirsTier filed its Notice of Appeal on February 8, 1989. No tolling motions as described in F.R.A.P. 4(a)(4) were filed. FirsTier's Notice of Appeal should have been treated as if it had been filed immediately after the court entered its order memorializing its decision on March 3, 1989.

[2] On February 10, 1989, IMI filed its Bill of Costs and Application for Attorney's Fees. IMI repeatedly characterized itself as the prevailing party and as having achieved a complete and total victory on summary judgment. FirsTier objected to same. IMI never raised the issue of the possible prematurity of FirsTier's appeal. The court of appeals raised this issue *sua sponte*.

On April 10, 1989, counsel for FirsTier received the court of appeals' letter dated April 5, 1989 directing counsel to brief the jurisdictional issues described therein (App. B.).[3]

On September 26, 1989, the United States Court of Appeals for the Tenth Circuit entered its order dismissing Appeal No. 89-6042 for lack of jurisdiction. The court of appeals found that the oral announcement by the district court on January 26, 1989, was not a final decision within the meaning of 28 U.S.C. §1291 (App. A.).

REASONS FOR GRANTING THE PETITION

1. The court of appeals has decided a question of federal law which has not been, but should be, settled by this Court. This Court should decide whether the announcement of a decision from the bench which disposes of all claims as to all parties, reserving the right to enter findings of fact and conclusions of law, constitutes the announcement of a final decision within the meaning of F.R.A.P. 4(a)(2).

2. The court of appeals' decision is in tension with this Court's decision in *Bankers Trust Co. v. Mallis*, 98 S.Ct. 1117 (1978). In *Mallis*, this Court said that Federal Rule of Civil Procedure ("F.R.C.P.") Rule 58's requirement of a separate

[3] Pursuant to F.R.A.P. 4(a)(5), on April 14, 1989, counsel for FirsTier filed its Application for Extension of Time to File Notice of Appeal from the trial court's March 3, 1989 Entry of Judgment. We believed that the court announced a final decision from the bench on January 26, 1989. However, if our understanding of the court's intent was in error, the error was excusable. The trial court agreed and granted FirsTier an extension of time until May 1, 1989 in which to appeal from the court's order entered on March 3, 1989. FirsTier filed its Notice of Appeal from the March 3, 1989 Order on April 25, 1989, resulting in 10th Circuit Appeal No. 89-6145. IMI appealed from the trial court's F.R.A.P. 4(a)(5) grant of an extension of time in which to appeal, resulting in Appeal No. 89-6150.

document could not have been intended to be such a categorical imperative that the parties are not free to waive it. In this case, the parties treated the trial court's announcement of its decision as a final decision. The parties waived the separate document requirement.

3. The court of appeals' decision is in conflict with decisions of other circuits. *See*, e.g., *Dowling v. City of Philadelphia*, 855 F.2d 136 (3rd Cir. 1988) (Court of appeals has power to take premature appeal where prematurity was cured shortly after filing notice of appeal by subsequently entered order. The Third Circuit noted the division in the courts of appeal on this issue in *Dowling, supra*, f.n. 2, p. 138). *Sacks v. Rothberg*, 845 F.2d 1098 (D.C. Cir. 1988) (Premature notice of appeal vests court of appeals with jurisdiction once district court disposes, finally, of all matters pending before it, citing case law in accord from Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits).

4. The path chosen by the court of appeals would, in essence, render Federal Rule F.R.A.P. 4(a)(2) a nullity. After the trial court announced its decision to cancel all of the insurance policies, the only thing that remained to be done was for the court to memorialize its decision in an order, with findings of fact and conclusions of law. Findings of fact and conclusions of law are not a prerequisite to appellate jurisdiction. *Featherstone v. Barash*, 345 F.2d 246 (10th Cir. 1965); *First National Bank of Fort Smith, Arkansas v. Mattingly*, 312 F.2d 603 (10th Cir. 1962).

A. Trial Court Announced A Final Decision From the Bench On January 26, 1989. FirsTier's

complaint sought enforcement of eight policies of private mortgage guaranty insurance plus punitive damages for IMI's bad faith refusal to honor the insurance policies. On January 26, 1989, the trial court announced its decision that all of the policies should be and are cancelled as void. Then the trial court said that FirsTier's claim for punitive damages was moot. The court's bench announcement extinguished FirsTier's entire complaint. The court's decision disposed of all of the issues as to all of the parties in the case and was, therefore, an announcement of a final decision. *Robert-Gay Energy Enterprises, Inc. v. State Corporation Commission of Kansas*, 753 F.2d 857 (10th Cir. 1985); *Sooner Products Company v. McBride*, 708 F.2d 510 (10th Cir. 1983); *Kasishke v. Baker*, 144 F.2d 384 (10th Cir. 1944). It has long been the rule that: "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229 (1945).

In *Federal Savings & Loan Insurance Corporation v. Huff*, 851 F.2d 316 (10th Cir. 1988), the Tenth Circuit Court of Appeals recognized the "theme of practicality" expressed by the Supreme Court in *Gillespie v. U.S. Steel Corporation*, 379 U.S. 148 (1964):

> "[O]ur cases long have recognized that whether a ruling is 'final' within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this court

has held that the requirement of finality is to be given a 'practical rather than a technical construction.' "

As a practical matter, FirsTier's lawsuit against IMI was over when the court announced that the policies "should be and are cancelled . . .". The court's decision was final and the court of appeals should have exercised jurisdiction over Appeal No. 89-6042 pursuant to F.R.A.P. 4(a)(2).

B. Findings Of Fact And Conclusions Of Law Not Jurisdictional Requirement. After the court announced its decision to cancel all of the insurance policies, the only thing that remained to be done was for the court to memorialize its decision in an order, with findings of fact and conclusions of law. Findings of fact and conclusions of law are not a prerequisite to appellate jurisdiction. *Featherstone v. Barash, supra; First National Bank of Fort Smith, Arkansas v. Mattingly, supra.*

The trial court's oral findings and conclusions announced at the end of the January 26, 1989 hearing were sufficient to indicate the basis of the trial judge's decision. Even in the absence of a formal judgment, the oral findings would have provided an adequate basis for appellate review. *Milliner v. Government of the Virgin Islands,* 593 F.2d 532 (3rd Cir. 1979).

C. Notice Of Appeal Should Have Been Deemed Filed On March 3, 1989. Federal Rule of Appellate Procedure (F.R.A.P.) 4(a)(2) provides: "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry

and on the day thereof." FirsTier filed its Notice of Appeal from the trial court's announcement of its decision on February 8, 1989. The trial court entered its Order and Judgment on March 3, 1989. There were no motions which would cause FirsTier's Notice of Appeal to "self destruct" pursuant to F.R.A.P. 4(a)(4). Pursuant to F.R.A.P. 4(a)(2), FirsTier's Notice of Appeal ripened on March 3, 1989, immediately after the court entered its Order and Judgment memorializing its bench announcement. *Acosta v. Louisiana Department of Health and Human Resources,* 652 F.2d 20 (9th Cir. 1981).

The Tenth Circuit recently considered F.R.A.P. 4(b) under circumstances virtually identical to this case. *United States of America v. Green,* 847 F.2d 622 (10th Cir. 1988). F.R.A.P. 4(b) provides that, in criminal cases, a "notice of appeal filed after the announcement of a decision, sentence, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof." The quoted language from F.R.A.P. 4(b) is virtually identical to the savings clause contained in F.R.A.P. 4(a)(2).

In *Green,* the criminal defendant moved for dismissal of an indictment. On October 18, 1985, the court denied his motion. On the same day, the defendant entered and the court accepted a conditional plea of guilty. Ten days later, the defendant filed his notice of appeal. Finally, on December 5, 1985, the court sentenced the defendant and entered its order of judgment.

The Tenth Circuit Court found that the saving provision in F.R.A.P. 4(b) allowed the defendant's notice of appeal to ripen after the court's judgment was finalized and entered. In reaching this

conclusion, the court cited *United States v. Moore*, 616 F.2d 1030 (7th Cir. 1980), *cert. den.*, 446 U.S. 987, a case in which the Seventh Circuit assessed the impact of the 1979 amendments adding the savings provisions to F.R.A.P. 4(a). The court in *Moore* said, *inter alia*, that the purpose of establishing a savings provision for premature notices of civil appeals was to "extend to civil cases the provisions of Rule 4(b) dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely." Advisory Committee on Appellate Rules, 1979 Amendment, Note to Subdivision 4(a)(2).

The *Green* case is one of three recent cases from the Tenth Circuit in which the court adopted a "forgiving attitude" toward premature notices of appeal. *Federal Savings & Loan Insurance Corporation v. Huff, supra; Lewis v. B.F. Goodrich Company*, 850 F.2d 641 (10th Cir. 1988).

Both *FSLIC v. Huff* and *Lewis v. B.F. Goodrich* involved cases which, unlike this one, involved multiple claims, part of which were not adjudicated when the notice of appeal was filed. However, before the circuit dismissed the appeal, the district court had adjudicated all remaining outstanding claims. The court found that F.R.A.P. 4(a)(2) permits the interpretation that the notice of appeal, filed prematurely, ripens and saves the appeal when all of the claims are finally adjudicated. And in *Lewis*, the court adopted the following approach:

> "When the district court case is still ongoing at the time the appeal reaches this court's attention, two possibilities arise. One is that a belated Rule 54(b) certification has been obtained. In this situation, if the appellant obtains a 54(b) certification after the notice of appeal was filed, we will deem the notice of appeal to ripen as of the date of certification and will accept the jurisdiction pursuant to the savings provisions of Fed.R.App.P. 4(a)(2). The other possibility is that no Fed.R.Civ.P. 54(b) certification has been obtained. For this, we hereby adopt the practice of notifying the parties of our observation of the apparent jurisdictional defect and giving them a date certain by which to secure Rule 54(b) certification or an order or judgment explicitly adjudicating all remaining claims. If no certification, or final, dispositive adjudication, is obtained and presented to this appellate court by the specified date, the case will be dismissed summarily for lack of appellate jurisdiction."

In this case, the trial court has disposed of all remaining claims by written judgments which have been entered on the docket. On March 3, 1988, the trial court entered its Order and Memorandum Opinion with findings of fact and conclusions of law sustaining Defendant's Motion For Summary Judgment and disposing of Plaintiff's entire Complaint. On April 6, 1989, the trial court entered its written order granting Defendant attorneys' fees.[4] The trial court has made a final, dispositive adjudication of all claims in the case. The court of appeals' decision is inconsistent with that of other circuits (*see* p. 6, *supra*). In fact, the court of appeals' decision is inconsistent with its own recently adopted approach to F.R.A.P. 4(a)(2). Even when the oral decision fails to dispose of all

[4] On April 12, 1989, FirsTier filed a Notice of Appeal from the trial court's order awarding defendant its attorneys' fees, resulting in Tenth Circuit Appeal No. 89-6128.

issues as to all parties in the case, the courts of appeals have held that the premature notice of appeal ripens when a final order disposing of all issues is subsequently entered.

The trial court announced its decision to dispose of FirsTier's entire complaint on January 26, 1989. The trial court's announcement was a final decision within the meaning of 28 U.S.C. §1291. On March 3, 1989, the trial court memorialized its decision in an Order and Judgment, with findings of fact and conclusions of law in a Memorandum Opinion. Pursuant to F.R.A.P. 4(a)(2), FirsTier's Notice of Appeal should have been deemed to be filed on March 3, 1989. The court of appeals should have accepted jurisdiction pursuant to the savings provision of F.R.A.P. 4(a)(2).

CONCLUSION

FirsTier's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JACK S. DAWSON, #2235
Attorney of Record
-and-
JANICE M. DANSBY, #2155
MILLER, DOLLARHIDE, DAWSON & SHAW
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

Attorneys for Petitioner

APPENDIX A

FILED
September 26, 1989
United States Court of Appeals
Robert L. Hoecker, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-6042
No. 89-6145

FIRSTIER MORTGAGE COMPANY, a/k/a REALBANC, INC.,
Plaintiff-Appellant,

v.

INVESTORS MORTGAGE INSURANCE COMPANY,
Defendant-Appellee.

ORDER

Before MOORE, BALDOCK and EBEL, Circuit Judges.

This matter comes on for consideration of an Order of the Court challenging appellate jurisdiction in 89-6042, the memorandum briefs of the parties in response thereto, the motion to dismiss filed in 89-6145 by Appellee-Defendant Investors Mortgage Insurance Company, the response in opposition thereto by Appellant-Plaintiff Firstier Mortgage Company, and the preliminary record on appeal.

Upon consideration whereof, it is ordered as follows:

1. 89-6042 is dismissed for lack of jurisdiction. The oral announcement by the district court on January 26, 1989 was not a final decision within the meaning of 28 U.S.C. §1291.

2. The motion to dismiss filed in 89-6145 is denied. The issue of excusable neglect raised by Defendant will be addressed by the panel assigned 89-6150 on the merits.

3. The opening brief on the merits in 89-6145 shall be served and filed by Appellant-Plaintiff within 40 days of the date of this Order. Subsequent briefing shall proceed in accordance with 10th Cir. R. 31.2.1. SEE 10th Cir. R. 10.2.

Entered for the Court
ROBERT L. HOECKER, Clerk

By:
THERESA SMITH
Deputy Clerk

APPENDIX B

United States Court of Appeals

TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294
Robert L. Hoecker, Clerk

April 5, 1989

TO: ALL COUNSEL

RE: 89-6042, FirsTier Mortgage Company, etc. v. Investors Mortgage Insurance Company

Dear Counsel:

The Court is considering summary dismissal of this appeal for lack of jurisdiction.

Within twenty-one (21) days of the date of this letter, the parties simultaneously shall serve and file memorandum briefs, in quadruplicate, in support of their respective positions on the jurisdictional issue(s) identified below. The memoranda shall contain citation to relevant legal authorities and proof of service on all parties. SEE 10th Cir. R. 27.2.2.

These memoranda shall address only the jurisdictional issue(s) set forth below. The issues on appeal are not to be discussed. The briefing schedule for the issues on appeal is *tolled* until further order of the Court. SEE 10th Cir. R. 27.2.3.

Very truly yours,

ROBERT L. HOECKER, CLERK

/s/
Kathleen T. Clifford
Deputy Clerk - Appeals Expediter

JURISDICTIONAL ISSUE(S):

1. Whether the February 8, 1989 Notice of Appeal was filed prematurely? SEE Fed. R. App. P. 4(a)(1).

2. Whether the decision orally rendered by the Court at the January 26, 1989 Hearing was final in light of the fact *that* the Court requested Defendant to submit suggested finding of fact and conclusions of law, *that* the Court then allowed Plaintiff a specified period of time to respond to the suggested findings and conclusions, and *that* the Court then indicated it would modify, add to, or delete and enter its own findings of fact and conclusions of law? *See* district court docket sheet entry No.148; 28 U.S.C. §1291.

Counsel-of-Record:

Jack S. Dawson, Janice M. Dansby, Miller, Dollarhide, Dawson & Shaw, 1212 Colcord Building, Oklahoma City, OK 73102

Eric S. Gray, John P. Roberts, Roberts, Gray, Goresen & Moriarty, 101 N. Robinson, Suite 1340, Oklahoma City, OK 73102

For Information:

Robert D. Dennis, Clerk, U.S. District Court for the Western District of Oklahoma Room 3210, U.S. Courthouse, Oklahoma City, OK 73102 (D. Ct. #CIV-87-564-B)

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Docket No. CIV-87-564
Oklahoma City, Oklahoma
January 26, 1989

FIRSTIER MORTGAGE COMPANY,
Plaintiff,

v.

INVESTORS MORTGAGE INSURANCE COMPANY,
Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LUTHER L. BOHANON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	JACK DAWSON and JANICE DANSBY Attorneys at Law Colcord Building Oklahoma City, OK
For the Defendant:	ERIC GRAY and GREG PILCHER Attorneys at Law 2900 First Oklahoma Tower Oklahoma City, OK
Court Reporter:	Lynn L. Hilton 3011-C U.S. Courthouse Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE COURT: The Court has for consideration this morning the case of Firstier Mortgage versus Investors Mortgage Insurance Company.

Jack Dawson, you represent the Plaintiff?

MR. DAWSON: Yes, Your Honor.

THE COURT: Mr. Roberts?

MR. GRAY: Mr. Roberts is not here today, Your Honor. Eric Gray and Greg Pilcher here on behalf of Investors.

THE COURT: Do you have a motion?

MR. GRAY: Yes, Your Honor, it is my Motion for Summary Judgment.

THE COURT: Do you want to be heard on it?

MR. GRAY: Yes.

THE COURT: I might say that the file in this case has become very voluminous. The parties have filed and refiled and filed and refiled papers and mortgages and I have read everything. I can't say that I understand everything perfectly, but I think I understand the problem is whether or not the insurance issued by Investors Mortgage Insurance Company is insurance that carries liability or whether it does not. Is that the question?

MR. GRAY: Yes, basically, Your Honor, whether my client is liable under the policies or is exonerated from those policies based on an Oklahoma Statute under Title 36, Section 3609.

THE COURT: Was there eight policies issued?

MR. GRAY: Yes, eight policies.

THE COURT: All right. The Court will hear you on it.

MR. GRAY: I realize that there is a mountain of briefs in this case, Your Honor, but in essence it is a very simple case. Plaintiff is in the business of making loans; Defendant is in the business of insuring losses on default on those types of loans.

The premium on insurance of this type is based on the risk insured, obviously. In the present case, there were eight mortgage loans that were made on duplex properties in Elk City, Oklahoma.

All of the properties were owned by the same man, a man by the name of Bill Tucker. Mr. Tucker sought to sell those properties. He found buyers. It is our contention that they were all straw buyers. It is admitted, by the Plaintiff at least, that five of them were what I call straw buyers. They didn't have any money of their own invested in the property.

There is some dispute over three of those properties, but I will address that in just a moment.

In connection with each of the mortgage loans, the Plaintiff sought insurance from my client, Investors Mortgage Insurance Company. My client reviewed the documentation that was submitted to them, which is set forth in the briefs herein, but essentially it is the loan application, all of the documents that go into making a loan.

Based upon those documents, my client issued commitment/policy to the Plaintiff on each of the loans. Those commitment/policies are in Exhibit B in my original Motion for Summary Judgment.

IMI, my client, thought they were insuring loans where the sales price was $94,000, where the appraised value was $94,000 and where the loan amount was 80 percent of the value of the property or approximately $75,200. That's what they thought.

In reality, that was not true. The truth was that there was no money involved in these transactions other than the loan amounts and the true loan to value ratio was 100 percent, because in essence the properties were being sold for the loan amounts.

These borrowers, there are six total borrowers, had no money of their own at stake, they made no down payment, they had no earnest money on deposit with any realtor.

The risk to my client when the loan changes from an 80 percent loan to 100 percent loan increases astronomically.

The relevant statutory framework that we need to look at, and the Court has previously granted partial summary judgment in this matter with respect to the applicability of Section 3609 of Title 36 of the Oklahoma Statutes.

That statute basically provides that once the Court finds that a misrepresentation, omission, concealment of fact or incorrect statement has been made, there is a second-prong to the test and that is in order to avoid liability under the policy, you must satisfy one of three elements; either the misrepresentation, incorrect statement, concealment of fact or omission must be fraudulent or must be material to the acceptance of the risk or the hazard assumed or the insurer in good faith would not have issued the policy had the true facts been known.

It has been contended by the Plaintiff that they were innocent in this transaction, that they had no knowledge that these borrowers weren't really making the down payments.

The statute provides that the representations made by or in behalf of the insured are sufficient to void the policy if they meet the terms of the statute.

The borrowers were making statements on behalf of Firstier, there's no question about that from the documents that are submitted to you. The affidavit of purchaser and vendor which had to be submitted at the time the policies were issued specifically says that to induce the mortgage insurer to insure these loans, you are representing that these facts are true. Well, they weren't true.

Even aside from that, the policies of insurance on their face state that there is to be a loan to value ratio of 80 percent. That was not true in this case.

The question becomes whether the loan to value ratio is material to the risk or in good faith IMI, my client, would not have issued these policies. We don't have to show that Firstier, the Plaintiff in this matter, knew about the fraud that was being perpetrated by these borrowers and by the seller.

If the Legislature had intended for knowledge to be a prerequisite, they would have left it with one alternative — fraudulent. But they didn't do that, they left it in the disjunctive. It can be fraudulent or it can be material to the risk or in good faith the insurer wouldn't have issued the policy. Any one of those three will void the policy.

There are some cases that are nearly directly on point. Particularly one, *United Guaranty v. Pioneer*, which is cited in the briefs in this matter. It is out of the Southern District of Florida. Essentially in that case the borrowers had misrepresented their income. But Florida had at that time an identical statute with the Oklahoma statute and the Florida Court gave judgment for the insurer.

In terms of meeting the materiality test, there is a case out of the Ninth Circuit, a 1987 case, *Verex v. John Hanson*. That case basically describes mortgage guaranty insurance. In paraphrasing it, it basically says there's very few things more material to mortgage insurance than the loan to value ratio. It measures the risk of the insured.

The most recent case interpreting Section 3609 under Oklahoma law is a case called *Coptin v. Shelter Insurance*. It is an Oklahoma Court of Appeals case. That case dealt with a situation where there was a theft loss and the insured had failed to disclose to the

insurer that its property had previously had a fire loss several years prior or that the property was for sale at the time of obtaining the insurance.

The Court of Appeals in reversing a jury verdict for the insured basically interpreted Section 3609 and held that even innocent misrepresentations would be sufficient to void a policy of insurance under Section 3609.

I had told the Court that I would come back to those three policies where there is some dispute. The policies where there is some dispute were taken out by a man by the name of Charles Wolfus and a couple by the name of Park and Glenda Largent. The Largents bought two of these properties and Mr. Wolfus purportedly bought one.

Each of these persons has testified under oath that they — well, Mr. Largent and Mrs. Largent testified they assumed they made the down payments, but they didn't know, didn't remember. Mr. Wolfus testified without a doubt he took a cashier's check to the closing payable to American First Abstract Company.

I think that the record will reflect that these statements are absolutely false. The Largents, based upon their financial position at the time and the source of their down payment, could not have possibly purchased two of these properties.

The Largents' source of down payment or settlement monies for one of the properties was to be from the sale of some other property that they had.

That property was shown as being sold on a settlement statement, but two days later the property was deeded back to the Largents and they therefore had no funds from the sale of that property to make the down payments in this case. Their other liquid funds were simply not sufficient.

Mr. Wolfus as well says that he gave a cashier's check to American First Abstract. Well, we subpoe-

naed the records of Mr. Bill Tucker, the seller in this case, from his bank. The bank records show eight checks written on Mr. Tucker's personal account; some of them, particularly in the case of the Largents', with the notation "Largents" at the bottom of them, in the exact amounts needed to close the loans at American First.

The truth is Mr. Tucker made the down payments. It was a wash to him. He put the money in, he got the money back, because he was the seller. The checks are written on the exact days of closing. Not all eight loans closed on the same day, they were over a period of time. But each check was written on the exact day that closing was to occur on one of the loans. It was written in the exact amount of the amount necessary, down to the penny, the amount necessary to pay under the settlement statement. They were all payable to American First Abstract in cash by American First Abstract.

There has been briefing in this case on the issue of the knowledge of the agent, American First, being imputed to Plaintiff Firstier.

I can address that if the Court wishes, but we do not contend or believe that the issue of Firstier's knowledge is in any way necessarily relevant. We have met the terms of the statute otherwise, but even if knowledge is relevant, we believe that the knowledge of that agent, American First Abstract in taking those eight checks from the seller, having no buyer with any money there giving it a check to American First should be imputed to Firstier since American First could do nothing but act for Firstier at that closing. It was an escrow agent. It took the money of Firstier, it took the instructions of Firstier as to how to disburse that money and when to disburse it and took on the responsibility of seeing that all of the documents were properly filed and executed.

There is one additional matter and that is there are two causes of action by Firstier in this matter. The first cause of action is on the eight loans. The second is a bad faith claim.

We would ask that if the Court grants summary judgment, that the Court grant summary judgment on the bad faith claim as well. My client cannot be in bad faith if the underlying policies are void. Thank you.

THE COURT: Mr. Dawson.

MR. DAWSON: If it please the Court, we have not addressed these bad faith issues in any of the briefs at all. We could, I suppose, file another mountain of briefs on that if necessary, but I don't think so. I won't speak to that issue.

These two parties before this Court were at one time, and we say still are, risk partners. Those are words that were chosen by the insurance company. They told us, "We are going to be your risk partners." They chose those words.

Both of us are going to take a risk on the reliability of borrowers, people who are going to borrow money from my client. My client is going to loan 100 percent of the money. We are going to, in addition, pay them some premium and they are going to help us out to the extent of 20 percent of our loss if the buyers aren't reliable. So we are really out there.

What we do — there is no application — what we do is every bit of the documentation that we have gathered in order to make our decision as to whether to loan these people money, we take all of those documents and give them to the insurance company for their review.

We have the affidavit in this case, we filed it, of Mack Martin who worked for the company at that time. He says, I'll paraphrase and quote part, "I and my underwriters independently decide whether to insure

the lender." They make their own decision based upon these documents. They are required to examine all documentation furnished by lender and make their own independent determination to quote, "Share the risk." The reason he puts that in quotes is because that's the insurance company's language, "Share the risk".

Now we made no misrepresentation to IMI. We made no representation at all. What the insurance company wants to say is that the false statements of these borrowers who we both are worried about, they were false. Well, those statements weren't made on behalf of the lender. They were made to the lender to make us do something, make us loan 100 percent of the money.

The affidavit that opposing counsel talks about is an affidavit prepared by the insurance company and the borrowers make those statements directly to the insurance company. They are not made on my behalf, on behalf of Firstier Insurance Company, nothing is.

We have the Brunson case which we have cited in our brief, *Brunson v. Midwestern Life Insurance Company*. It says that a misrepresentation in insurance is a statement which the insured — that would be Firstier — which the insured states with the knowledge that it is untrue and with an intent to deceive. That's what they are going to have to prove my client did; that we knew a statement we made was wrong and we meant to deceive them or they can prove that we made a statement positively without knowing whether it was true or not.

If they can prove either one of those things, then we have made a misrepresentation under this 1976 case from the Oklahoma Supreme Court.

No statement that we made was untrue at all. Particularly we made no statement that we knew anything was positively true. What we say is, what they

have us to say and the only representation we make at this time back in 1982 was that the statements made in the affidavit, the affidavit being made by the lender, to the best of our knowledge — and that's the words which IMI carved out for us to say, "To the best of our knowledge, those statements are true and correct."

That is true. At that point those statements were true and correct to the best of the knowledge of Firstier or they wouldn't be loaning 100 percent, they wouldn't be loaning 90 or $80,000 or whatever it is.

That's the way it was. That's all they asked us to tell them at that time. To the best of our knowledge, these statements are true. There's not a scintilla of evidence that Firstier had any idea that anything was going on at the time it was going on.

Now in 1984, after this, the insurance company changed and if — this is the point — if we had signed-on in '84, then we wouldn't be here today. There would be no case at all, there would be none, because later, before we made our claim but after we got our insurance policy, they changed. Then we would have to agree that the warranties — I'm quoting — "The warranties, representations and statements made herein and the documents, forms and other written matter submitted in the process of obtaining this commitment, whether made by the insured, the borrower or any of the parties shall be deemed warranties, representations and statements of the insured and which shall be deemed material for purposes . . ." and so forth.

After 1984, lenders had to agree that any statement made by the borrower was their statement. But before 1984, they didn't make that. That is the pivotol point on this case. Are the statements made by the borrowers our statements? No. Are they made on our behalf? No. They were made to us and they were made directly to IMI, but not by us or on our behalf.

This case is like the fellow who has a house and he wants to insure it against termites. He tells the insur-

ance company, "I don't think I have termites. You come look at my house." They go look at the house and it turns up they don't think he does and they issue the policy but later they determine all the time he had termites.

Or a health insurance policy where the man says, "I think I'm in good health" and later it is determined that he had some kind of disease or something.

There is a case just like that. It is the Whitlack case, a Oklahoma case, 1968, *Whitlack v. John Hancock*. This fellow knew that he had shortness of breath and chest pain, knew that he had high blood pressure, but he made an application saying he was in sound health. He later died two months after he got the insurance policy of a coronary thrombosis.

The trial Court ruled against the widow. But the Supreme Court said, "No, because the rule" — I'm quoting — "The rule consistently applied by this Court in a multitude of decisions is that the question of falsity of statements in an application for life insurance and the applicant's intent in making such statements are questions for determination by the jury."

Whether the applicant intended to deceive is a question for determination by the jury, says the Whitlack case. That was a health and accident or life insurance case like I was talking about.

IMI told us all the time that after we make our review, our independent review of these documents and after we issue this policy, we are going to come around and spot-check. If we find that we have been deceived, do you know what we are going to do? Nothing. We are not going to cancel this policy if we find out the borrower or the appraiser has deceived you and us. That's in their manual.

Their policy is different now, but back when we came on board with them, their policy — and we have supplied this with our materials — says that "Negative

review findings in no way affect the validity of the commitment or policy of insurance which has been issued."

If they review these loans and find bad acts, that's just a service that they will prepare for us. Frequent and significant variations will cause IMI to contact the lender to determine the cause of the discrepancies and try to help identify the problem and so forth.

On appraisals, on spot-checking these appraisals, after the policy is issued, if they think something is wrong, they will engage a qualified, independent appraiser to prepare a report on fair market value of the property and if they find chronic problems with individual fee appraisers, it will share that knowledge with lenders as a part of IMI's risk partnership with the lender.

In other words, they say we are going to spot-check all of these loans. If we find out the appraisers are phony or if we find out the borrowers are crooked, we are going to tell the lender. We are going to share that knowledge with you as a part of our risk partnership with you. We are not going to cancel the policy because of it, because they couldn't at that time. That wasn't their policy then. They have got new owners and they have got new policies now.

The affidavit of Mack Martin who worked for them at the time, the vice president in this region, said that he knew of no policy that had ever been canceled because of these reviews after the policies were issued. It had never happened before. Well, that changed. But it changed after this policy was issued, Your Honor.

That's the important part of this lawsuit. Again I'll tell you, admit, that if we had taken out these policies in 1984 after the policies changed, we wouldn't be here. This lawsuit wouldn't have been filed. We couldn't have filed it. Before then we could have. It was a different contract we had.

Counsel talked a little bit at the end about the agent, American First. In this case we have filed, when they brought up that issue late in the case, we got an affidavit and went down to American First, went through the situation with them and we have an American First affidavit that's filed in the case.

American First says, We are not the agent of Firstier here. We are a stakeholder and that's all we are. We have no knowledge of anything that was done wrong anyway. We don't have any knowledge that anything was done wrong. Our files are perfectly in order. We don't have any knowledge.

I don't see the relevance of even bringing up the closer in this case under the facts in this case.

Thank you, Your Honor.

THE COURT: Yes.

MR. GRAY: Brief rebuttal, Your Honor.

Counsel discussed the contract between the parties. The contract between the parties is contained in the commitment policy. Briefly I would like to tell or read to the Court what that contract says.

It says, "In consideration of the premium paid by the insured lender and the representations made by the insured lender below and in the application submitted, Investors Mortgage Insurance Company agrees to pay insured lender subject to the terms and conditions of this policy any loss sustained by reason of the default by the borrower in payments upon the loan identified as follows." Then they identify the loan.

The loan is identified as having a sales price of $94,000 and an appraised value of $94,000, a loan to value ratio of 80 percent.

At the bottom of the contract between the parties, it states, "Representations: The insured lender hereby represents that the loan transaction designated above has been closed, the loan is not in default.

Any special conditions set forth herein have been satisfied by the buyer/seller affidavit that we made reference to previously and other necessary documents have been forwarded to the company and that the appropriate premium has been paid."

That's the contract between the parties. These representations are the representations of Firstier. But even if they are not, they are the representations made by borrowers on behalf of Firstier.

It was stated that there's not a scintilla of evidence that Firstier knew. Obviously Investors Mortgage Insurance disputes that fact.

I won't dwell on this, Your Honor, but the loan officer who took the applications for these loans was the same individual. Some of the borrowers testified that they never personally met with him even though the loan applications state on their face that they were taken by face-to-face interview.

The loans that are the subject of the litigation today were not ever subject to that spot-check review. It is completely irrelevant. But even if it is somehow thought to be relevant, it is tantamount to saying that it's okay to defraud us. That would never be said by any insurance company and certainly wasn't the intent of Investors Mortgage Insurance in this case.

It was also stated previously that intent is always a question for the jury. Now I totally agree with that. But I also would show the Court that intent is not an issue in this case. The intent of Firstier in obtaining these mortgage insurance policies is not an issue. The issue before the Court is the interpretation of Section 3609 and its applicability to these facts.

Thank you, Your Honor.

THE COURT: Does counsel have anything further to say?

MR. DAWSON: I think we probably both have a lot more to say, but I think it would be repetitive. I don't have anything further.

THE COURT: As I said earlier, I have read and reread the pleadings, read and reread the exhibits and I have come to the conclusion that the insurance company relied on the package in making these various policies to guarantee the payment of the buyer of the property.

There's no question in my mind but what the package was submitted in bad faith; very, very bad faith. I don't have any trouble finding that it was submitted with dishonesty in mind to get the insurance company to pay these properties.

I find no justification for dropping the appraised value from $94,000 down to where they did.

I find that the policies should be and are cancelled as void for want of fraud, bad faith. The Court has heard no evidence in the matter of this hearing to change its mind from holding that the policies are void.

Of course in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit.

The Court does find that they relied on the package in each of these loans and the package was not honest. In fact it was dishonest. The dishonesty should and does void the policy.

Now, Mr. Gray, the Court will ask you to submit suggested findings of fact and conclusions as to each one of these loans, citing the evidence that you rely on and where it can be located. The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court then will modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about.

How much time do you want to submit this to the Court?

MR. GRAY: Would ten days be inappropriate, Your Honor?

THE COURT: That would be all right. You may submit to Mr. Dawson a copy of it for his review. And if Mr. Dawson cares to do so, within five days you may file with the Court your objection or suggestion wherein you find that the suggestions of Mr. Gray are in error, if you care to do so.

I don't think there's any question, no question at all in my mind that this is a case where there's deliberate, willful, misleading an insurance company to guarantee the payment of these properties.

The Court had difficulty in understanding just why they suddenly and without just cause dropped the value from the $94,000 appraised value to 20 percent less; they had to to make the deal. I think that's the only reason it was done.

Is there anything else to come before the Court?

MR. DAWSON: Could I ask you to clarify for us, you made a couple of statements that the package was submitted in bad faith and submitted with dishonesty in mind.

Is it the Court's ruling — I'm not arguing with the Court at all — that that was a bad faith of Firstier or dishonesty in the mind of Firstier?

THE COURT: Well, it would be the bad faith of Firstier.

MR. DAWSON: Okay.

THE COURT: And the bad faith of the borrower, both of them. They worked together.

MR. DAWSON: Thank you, Your Honor, for that clarification.

MR. GRAY: May I assume that the bad faith claim, which was the other cause of action, is also moot at this point?

MR. DAWSON: I would agree with counsel that if this action is dismissed, then the bad faith action must be dismissed along with it.

I don't agree it should be, but I agree with him in his legal interpretation that with this ruling, that this ruling would force the Court to do that.

THE COURT: That will be the ruling.

Court is in recess.

CERTIFICATION

I, Lynn Hilton, Official Court Reporter, do hereby certify that the foregoing 24 pages constitutes a true and complete transcription of my shorthand notes as taken by me on the date set forth herein.

Dated this the 12th day of February, 1989.

/s/ _____

Lynn Hilton, CSR, RPR/CP

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

ORDER AND JUDGMENT

Consistent with the Memorandum Opinion entered herein this day,

IT IS ORDERED that the following policies issued by Investors Mortgage Insurance Co. to Firstier Mortgage Co. are void and, as such, are unenforceable:

Policy No.

456987
456988
457066
457078
457225
457246
457247
457224

Further, IT IS ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of the defendant and against the plaintiff.

Dated this 3rd day of March, 1989.

/s/ _____
LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

Entered in Judgement Docket on 3-3-89

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

MEMORANDUM OPINION

This matter is before the court on the Defendant, Investors Mortgage Insurance Co.'s ("IMI"), Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure.

The plaintiff, Firstier Mortgage Co., a/k/a Realbanc, Inc. ("Firstier"), commenced this suit against the alleged bad faith failure of IMI to pay Firstier's claims on eight policies of private mortgage insurance underwritten by IMI. IMI defends by arguing that under Okla. Stat. tit. 36, § 3609 the policies are void because of misrepresentations, omissions, concealments of facts, and incorrect statements made by or in behalf of Firstier in the applications and negotiations for the insurance policies. IMI claims that such misrepresentations, omissions, concealments of facts, and incorrect statements were fraudulent and material to the acceptance of the risk or hazard assumed by IMI. In addition, IMI claims that if it had known the true facts, IMI in good faith would not have issued the eight policies of private mortgage insurance.

Being a drastic measure, summary judgment should be granted with caution. *Machinery Center, Inc. v. Anchor National Life Insurance Co.*, 434 F.2d 1

(10th Cir. 1970). At the same time, due regard must be given, not only to the rights of the plaintiffs to have asserted claims which are adequately based on law and in the facts to be tried by a jury, but also to the defendants' rights to show, before trial, that such claims have no factual basis. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Still the evidence and all reasonable inferences must be viewed in the light most favorable to the plaintiff. *Bruce v. Martin Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976). If the court determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, summary judgment should be granted. *Id.* at 445. To determine if there is a need for trial, the court must pierce the pleading and evaluate the proof in the case. Fed.R.Civ.P. 56 advisory committee notes. After a motion for summary judgment, the plaintiff cannot rely on *mere conclusions* but must present sufficient evidence to establish that his claim has merit. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Having read the briefs and reviewed the exhibits and the parties' submissions, and having heard the arguments of counsel, the court makes the following findings of fact and conclusions of law:

Findings of Fact

1. IMI underwrites private mortgage insurance that insures lenders against losses sustained on mortgage loans because of default by the borrowers.

2. In January, 1983, Firstier financed eight first mortgage loans on eight duplexes located in Elk City, Beckham County, Oklahoma. Firstier applied to IMI for private mortgage insurance coverage on each of the eight mortgage loans.

3. In connection with seeking private mortgage insurance from IMI to cover each of the eight mortgage loans, Firstier prepared, compiled and submitted eight insurance application packages to IMI. Each application included the following documents:

a. Loan Application of Borrower,
b. Credit Report for Borrower,
c. Verification of Borrower's income
d. Deposit Verification(s),
e. Property Appraisal,
f. Sales Contract,
g. Firstier's Summary of Loan Transaction, and
h. Affidavit of Purchaser and Vendor.

4. Subsequent to receiving the eight applications from Firstier, IMI issued a Commitment/Policy covering each of the mortgage loans. The policy number on the Commitment/Policy as well as the borrower's name and the real property purchased are as follows:

Policy Number	Name/Address
456987	Parke H. and Glenda A. Largent 107 Cripple Creek Lane Elk City, Oklahoma
456988	Parke H. and Glenda A. Largent 105 Cripple Creek Lane Elk City, Oklahoma
457066	Henry M. and Janice C. Staat 109 Cripple Creek Lane Elk City, Oklahoma
457078	Larry E. Busking 103 Cripple Creek Lane Elk City, Oklahoma
457225	Keith H. and Paula K. Busking 123 Cripple Creek Lane Elk City, Oklahoma
457246	Don W. Armstrong 125 Cripple Creek Lane Elk City, Oklahoma
457247	Don W. Armstrong 121 Cripple Creek Lane Elk City, Oklahoma

Policy Number	Name/Address
457224	Charles O. and Mary Ann Wolfes 111 Cripple Creek Lane Elk City, Oklahoma

5. Each Affidavit of Purchaser and Vendor submitted by Firstier was signed both by Firstier and by the purchaser and vendor. Each Affidavit of Purchaser and Vendor states, among other things, that the total purchase price for each property is $94,000.00, that each borrower has a cash equity equal to $18,800.00, and that the first mortgage amount is $75,200.00. In addition, each Affidavit states that the prepaid expenses involved in the loan transaction have not been paid by the vendor. Each Affidavit of Purchaser and Vendor also states that the certifications of the Affidavit are for the purpose of inducing the mortgage insurer to insure the loan.

6. Settlement statements were prepared on each of the eight loans. Each of the settlement statements was signed by the seller, the respective buyers, and by the settlement agent. Each of the settlement statements indicates that cash was paid from the borrower at the closing. However, none of the borrowers paid cash at the various closings. Instead, the seller, Bill Tucker, made the down payments for each of the borrowers resulting in no equity in the purchaser.

7. Firstier admits that Henry M. and Janice C. Staat made no earnest deposit or down payment in connection with the purchase of property in Elk City, Oklahoma, commonly referred to as 109 Cripple Creek Lane. The settlement statement prepared in connection with this loan transaction states that the borrowers were to pay $14,646.52 at closing. However, this amount was paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

8. Firstier admits that Larry E. Busking made no earnest deposit or down payment in connection with the purchase of property in Elk City, Oklahoma, com-

monly referred to as 103 Cripple Creek Lane. The settlement statement prepared in connection with this loan transaction states that the borrower was to pay $14,810.29 at closing. However, this amount was paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

9. Firstier admits that Don W. Armstrong made no earnest deposit or down payment in connection with the purchase of properties in Elk City, Oklahoma, commonly referred to as 121 and 125 Cripple Creek Lane. The settlement statements prepared in connection with these loan transactions state the borrower was to pay $16,615.43 at the closing of each loan. However, these amounts were paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

10. Firstier admits that Keith H. and Paula K. Busking made no earnest deposit or down payment in connection with the purchase of property in Elk City, Oklahoma, commonly referred to as 123 Cripple Creek Lane. The settlement statement prepared in connection with this loan transaction states that the borrowers were to pay $16,721.52 at closing. However, this amount was paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

11. Parke H. and Glenda A. Largent made no earnest deposit or down payments in connection with the purchase of the properties in Elk City, Oklahoma, commonly referred to as 107 and 105 Cripple Creek Lane. The settlement statements prepared in connection with these loan transactions state that the borrowers were to pay $14,835.29 at each closing. However, these amounts were paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

12. Charles O. and Mary Ann Wolfes made no earnest deposit or down payment in connection with the purchase of property in Elk City, Oklahoma, commonly referred to as 111 Cripple Creek Lane. The down payment on the property was paid by Bill

Tucker, the seller. The settlement statement prepared in connection with this loan transaction states that the borrowers were to pay $14,721.52 at closing. However, this amount was paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

13. The vendor and the respective borrowers executed the Affidavits of Purchaser and Vendor for the purpose of inducing IMI to underwrite private mortgage insurance covering the loans. In the Affidavits of Purchaser and Vendor, the borrowers and the vendor falsely represented the true purchase price of the properties. The borrowers and the vendor also falsely represented that the borrowers made down payments and had personal funds at risk on each of the eight loans; it is unquestionable that the purported borrowers had no cash equity in any of the properties.

14. The Affidavits of Purchaser and Vendor were submitted to IMI by Firstier for the purpose of inducing IMI to insure the subject loans. In each of the eight Affidavits of Purchaser and Vendor, Firstier represented that the total purchase price for each property was $94,000.00, that the mortgage amount was $75,200.00, that the loan-to-value ratio was eighty percent (80%), and that each borrower had a cash equity in the respective properties equal to twenty percent (20%) of the purchase price. These representations were false. Because the borrowers made no down payments and had no equity in the properties, it is unquestionable that Firstier provided one hundred percent (100%) financing on each property and that the true-loan-to-value ratio was one hundred percent (100%). Loan-to-value ratio is defined in IMI's Underwriting Guidelines as the loan amount divided by the appraised value or sales price, whichever is lower.

15. Firstier signed the commitment/policies issued by IMI. Each of the eight commitment/policies expressly states that Firstier made the following representations:

> REPRESENTATIONS: The Insured Lender hereby represents that the loan transaction designated above has been closed, such loan is not in default, any special conditions set forth herein have been satisfied, that the Buyer-Seller Affidavit and other necessary documents have been forwarded to the Company, and that the appropriate premium indicated below has been paid to the Company.

The commitment/ policies issued by IMI and signed by Firstier stated that each of the loan transactions possessed the following characteristics:

1. A loan-to-value ratio equal to eighty percent (80%);
2. A selling price equal to $94,000.00; and
3. An appraised value equal to $94,000.00

It is unquestionable that these representations were false. Because the seller made the down payments for the buyers, the true sales price was $75,200.00 on each property. Further, because Firstier made loans equal to the sales price, the true loan-to-value ratio on each property was one hundred percent (100%). Finally, the evidence is convincing that the appraised value is substantially overstated given that the true selling price was only $75,200.00.

16. The settlement agent in each of the eight mortgage loan transactions was Brenda Lowery from American First Abstract Company. Firstier gave instructions to the settlement agent on a document known as a closing request transmittal rather than sending its own representative to the closings. Thus, although Firstier did not select the particular settlement agent, the settlement agent acted on Firstier's behalf and as Firstier's agent in closing the eight loans at issue in this case.

17. Pursuant to Firstier's instructions, Ms. Lowery was aware that the loan-to-value ratio could not exceed eighty percent (80%) and knew that the borrowers

did not make down payments on any of the eight mortgage loans at issue in this case. Because the cash due from the borrowers at the closing was paid by Bill Tucker, the seller, it is clear that Ms. Lowery knew that Mr. Tucker made the down payments for the borrowers.

18. IMI does not knowingly insure investor owned property mortgage loans where the loan-to-value ratio is greater than ninety percent (90%), the borrower's equity or down payment in the property is not at least ten percent (10%) of the purchase price of the property, and the sale and purchase of the property is not an arm's length transaction.

19. Under Local Rule 14, it is undisputed that IMI, in good faith, would not have issued any of the eight commitment/policies if IMI had been aware that the borrowers did not make down payments, that the borrowers had no equity in the property, that the true loan to value ratios were greater than eighty percent (80%), or that the appraised values and selling prices were substantially inflated. In short, IMI would not have issued the insurance policies at issue in this case had the true facts about each of the loan transactions been made known to IMI as required by the insurance applications.

20. The misrepresentations made in connection with the loan-to-value ratio, the borrowers' equity or loan payments in the property, and the purchases and sales of the properties were material to the acceptance of the risk assumed by IMI when it issued the insurance policies at issue in this case.

21. IMI denied Firstier's claims for loss under the eight insurance policies because of material misrepresentations, omissions, concealment of facts, and incorrect statements either made to or supplied to IMI by Firstier.

22. Although IMI independently decides whether to underwrite insurance on any given mortgage loan,

IMI's decision whether to insure a lender against loss sustained by reason of default by a borrower is based solely upon the documentation and representations submitted as part of the application for insurance. IMI did not deviate from its normal procedure in this case. IMI relied solely upon the packet of materials furnished by Firstier to IMI in determining whether to underwrite insurance on the eight loans involved in this case. The independent review that IMI conducts before issuing a commitment/policy consists only of reviewing the packet of materials furnished to IMI by the lender. IMI did not independently verify the information contained in the packet of materials furnished to IMI by the lender before issuing insurance policies on the eight loans at issue in this case.

23. Paragraph 19(a) on the reverse side of each of the eight commitment/policies renders invalid any oral statements or representations made by IMI that purport to modify the commitment/policies. Paragraph 19(a) has no relevance to misrepresentations, concealments of facts, omissions and incorrect statements made by the lender to induce IMI to underwrite insurance.

Conclusions of Law

1. The propriety of IMI's denial of Firstier's claims under the insurance policies at issue in this case is governed by Okla. Stat. tit. 36, § 3609. Section 3609 furnishes three separate grounds for an insurance company to deny coverage on an insurance policy. Specifically, Section 3609 provides:

> All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy unless:

> 1. Fraudulent; or
>
> 2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> 3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

2. The underwriting package that Firstier submitted to IMI in connection with procuring private mortgage insurance on the loans at issue in this case constitutes an "application for an insurance policy" within the meaning of Okla. Stat. tit. 36, § 3609.

3. Section 3609 specifically encompasses representations made "by or in behalf of the insured." The court agrees and specifically finds that representations made by Firstier's borrowers in documents that Firstier submitted to IMI with the insurance applications were made in behalf of Firstier for the purpose of inducing IMI to underwrite insurance and, thus, fall squarely within Section 3609 and are material "to the acceptance of the risk, or to the hazard assumed by" IMI, so as to prevent recovery on the policies.

4. The Affidavits of Purchaser and Vendor, which Firstier acknowledges submitting to IMI with the insurance application packages, were signed by the borrowers. The Affidavits of Purchaser and Vendor expressly state that they were submitted for the purpose of "inducing the mortgage insurer, if any, to insure such loan." The Affidavits of Purchaser and Vendor represent that the borrowers each had a cash equity in their respective properties in the amount of $18,800.00, that the purchase price for each property was $94,000.00, and that the first mortgage amount was

$75,200.00. However, it is undisputed that the borrowers on five of the loans insured by IMI for Firstier did not make down payments or earnest deposits. Thus, it is unquestionable that the representations made in the Affidavits of Purchaser and Vendor were false. Because these borrowers did not make down payments, they had no cash equity in the properties and the true sales price was only $75,200.00.

5. The Affidavits of Purchaser and Vendor were also signed by Firstier. Firstier represented that the total purchase price for each property was $94,000.00, that the mortgage amount was $75,200.00, that the borrowers had cash equity in the properties equal to $18,800.00, and that the loan-to-value ratio was 80%. Obviously, Firstier's representations were also false. In addition, because the borrowers had no cash equity in the properties, it is clear that Firstier provided 100% financing on the properties and the true loan-to-value ratio was 100%.

6. Firstier also made misrepresentations when it signed each of the commitment/policies. Firstier expressly represented on the commitment policies that each loan had a loan-to-value ratio equal to 80%, that the selling price of each property was $94,000.00, and that the appraised value of each property was also equal to $94,000.00. These representations were obviously false given that the borrowers had no equity in the properties and that the true loan-to-value ratios were 100%.

7. The loan-to-value ratio is material to the risk assumed by IMI. As the Ninth Circuit recognized:

> LTV [loan-to-value] ratio is material because it measures risk, the touchstone of an insurance contract. As the LTV ratio increases, the risk of insuring the loan also increases even though the amount of the loan remains the same.... The risk of insuring the loan also increases even though the amount of the loan remains the same.... The risk [the insurer] was willing to accept was implicit in the commitments, stated LTV ratios.... No down payments, however, were made. The actual loan-to-scale price ratios exceeded 100%. The risk of insurance had increased, the terms of the commitment had been modified, and [the insurer] was entitled to rescind.

Verex Assurance, Inc. v. John Hanson Savings & Loan, 816 F.2d 1296, 1302 (9th Cir. 1987).

8. It is unquestionable that the borrowers fraudulently and in bad faith misrepresented in the Affidavits of Purchaser and Vendor that they had cash equity in the properties. Such fraud was perpetrated in behalf of Firstier for the purpose of inducing IMI to underwrite insurance on the loans. Thus, pursuant to Okla. Stat. tit. 36 § 3609(1), the borrowers' fraud prevents Firstier from recovering under the policies and renders the policies void as a matter of law.

9. American First Abstract was Firstier's sole representative at the eight closings and acted pursuant to instruction from Firstier. Thus, although Firstier did not specifically select American First Abstract as the particular settlement agent, American First Abstract clearly acted on Firstier's behalf and therefore was Firstier's agent. *See e.g. Hibbard v. Ford*, 55 Okla. 563, 155 P. 510, 511 (1916).

10. American First Abstract, acting as agent for Firstier at the various loan closings, knew that none of the borrowers made down payments or earnest deposits and that therefore none of the borrowers had any cash equity in the properties. It is a fundamental principal of the law of agency that the agent's knowledge is imputed to his principal. *Bailey v. Gulf Insurance Co.*, 389 F.2d 889, 891 (10th Cir. 1968); *A.A. Murphy, Inc. v. Banfield*, 363 P.2d 942, 946 (Okla. 1961); *Capps v. Whitegrass-Waterhold Flood Control and Conservency District*, 359 P.2d 318, 321 (Okla. 1961); *Bonded*

Toyalties, Inc. v. Jefferson, 174 Okla. 345, 50 P.2d 281, 283 (1935); *Allison v. Crummey*, 64 Okla. 20, 166 P. 691, 697-698 (1917). Because there is no evidence that American First Abstract was secretly acting adversely to Firstier's interest at the closings, Firstier is bound by the knowledge of its agent, American First Abstract, and is charged with the knowledge that the borrowers had no cash equity in the properties. *Bailey*, 389 F.2d at 891. Thus, it is unquestionable that Firstier submitted the insurance applications in bad faith and that such conduct constitutes fraud sufficient to void the policies under Okla. Stat. tit. 36, § 3609(1).

11. Although the court finds that Firstier and its borrowers submitted the insurance applications fraudulently and in bad faith, that finding is not necessary to this court's holding. It is not relevant whether Firstier knew that it was supplying inaccurate information with the applications so long as the misrepresentations were material to the acceptance of the risk or were relied upon by IMI in deciding to issue the insurance policies. *See* Okla. Stat. tit. 36, §§ 3609(2)-3609(3). Oklahoma courts have expressly held that Okla. Stat. tit. 36, § 3609 was designed to "provide relief from a policy the insurer was induced to issue as a result of fraudulent or *non-fraudulent* misrepresentation of material facts by the insured." *Coppin v. Shelter Mutual Insurance Co.*, 742 P.2d 594, 597 (Okla. App. 1987) (emphasis added).

12. Courts from other jurisdictions construing statutes identical to Okla. Stat. tit. 36, § 3609 have routinely held that even innocent misrepresentations will prevent recovery under the policy. In *McDonnell v. New England Mutual Life Insurance Co.*, 380 F.2d 983, 985 (5th Cir. 1967), the court of appeals upheld an award of summary judgment for the insurance company, declaring:

> There may be said to be a question of fact present as to whether the admitted misrepresentations were made falsely, with intent to deceive, or were made in good faith. But the resolution of this question was not required. Even if the incorrect statements were made in good faith, the Florida statute . . . barred recovery. In a word, this issue, if assumed to be present, was immaterial. It was not a 'genuine issue as to any material fact.' (Rule 56 F.R.Civ.P.).

See also Allstate Insurance Co. v. Winnemore, 413 F.2d 858, 862 (5th Cir. 1969); *United Guarantee Residential Insurance Corp. v. American Pioneer Savings Bank*, 655 F.Supp. 165, 168 (S.D. Fla. 1987).

13. In light of the foregoing authorities, it is clear that Okla. Stat. tit. 36, § 3609 affords relief from an insurance policy issued on the basis of material misrepresentations made in the application by or in behalf of the insured, even if such misrepresentations were made innocently and in good faith. All that Okla. Stat. tit. 36, § 3609 requires is that the misrepresentation be material to the acceptance of the risk or for the insured in good faith to prove that it would not have issued the policy with the same terms, if it had known the truth; no actual knowledge of incorrectness, untruth, or deliberate falsehood is required. *See United Guarantee Residential Insurance Corp. v. American-Pioneer Savings Bank*, 655 F.Supp at 168. Accordingly, pursuant to Okla. Stat. tit. 36, § 3609, Firstier is prevented from recovering under the policies because the documents it submitted to IMI for the purpose of inducing IMI to issue the policies contained misrepresentations that were material to the risk assumed by IMI. Indeed, it is uncontroverted that if IMI had known the true facts IMI would not have issued the policies.

14. Although Firstier has admitted only that the borrowers on five of the loans did not make earnest deposits or down payments, IMI has submitted overwhelming uncontrovertible evidence that none of the borrowers made down payments as represented in

documents submitted by Firstier as part of the insurance applications. Copies of cancelled checks made payable to the settlement agent by the seller of the properties for the exact amount of the borrowers' purported down payments conclusively establish that the seller made the down payments for *all* of the borrowers and that the borrowers in fact had no cash equity in the properties. Firstier has failed to come forward with any credible evidence to controvert these facts. The unsupported statements of Firstier's borrowers is not sufficient in the face of such evidence to get past summary judgment. On a motion for summary judgment the movant is not required to show that the evidence "unmistakably" is in its favor. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 252, (1986). The movant must show only that a "fair-minded jury could [not] return a verdict for the plaintiff on the evidence presented." *Id.* On this record and in light of the overwhelming documentary evidence adduced by IMI, it is clear that no jury could reasonably find that any of the borrowers made down payments or otherwise had cash equity in the property as represented to IMI.

15. The court concludes that there is no genuine issue as to any material fact and that IMI is entitled to a judgment as a matter of law. Because the insurance applications contained misrepresentations that were material to the risk assumed by IMI and because Firstier submitted the insurance applications fraudulently and in bad faith, the eight insurance policies at issue in this case are declared void.

In accordance with the foregoing findings of fact and conclusions of law, an order will be entered herein this day.

Dated this 3rd day of March, 1989.

/s/ _____
LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE DISTRICT COURT
IN AND FOR
STATE OF OKLAHOMA

NO. CIV-87-564B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.
Defendants.

CAUSE

28 USC 1332: breach of insurance contract — tort bad faith

ATTORNEYS

PLAINTIFF:
Jack S. Dawson, Janice M. Dansby
MILLER, DOLLARHIDE, DAWSON & SHAW
1200 Colcord Building
Oklahoma City, Oklahoma 73102
405/236-8541

DEFENDANT:
Eric S. Gray
ROBERTS, GRAY, GORESEN & MORIARTY
Suite 1340
American First Tower
101 N. Robinson Ave.
Okla. City OK 73102
405/235-0123 (1)

CIV-87-564B

DATE	NR.	PROCEEDINGS
03-18-87	01	COMPLAINT
03-18-87	02	PRAECIPE For & Issd 1 Summs
03-31-87	3	RETURN of Serv re Summ:
		EXECUTED ON Investors Mortgage Ins., c/o Gerald Grimes, Ins. Comm., cert mail on 3-26-87 (20 days)
04-08-87	4	ENTER ORDER: This cs is transf to Honorable Luther Bohanon (ALLEY) ly
04-15-87	5	APPLICATION for Ext of Time to answ by dft w/s.
04-17-87	6	AMENDED COMPLAINT w/s.
04-20-87	7	ORDER granting dft's appl for ext of time to answer is ext 20 dys from April 15, 1987. (BOHANON)kb
5-01-87	8	APPLICATION for Ext of Time, to plead or ans by dft -w/s
5-04-87	9	ORDER that the time for ans the Compl by dft Investors Mortgage Ins Co is extended to 5-11-87 (BOHANON)kb
5-05-87		*SCHEDULING/STATUS CONF: Thurs, June 4, 1987 at 11:00 am (BOHANON) kb*
05-11-87	10	ANSWER, by dft w/s
05-29-87	11	STATUS Report, by ptys
06-04-87	12	SCH/STATUS CONF: ptys to exch wit & exh lists by 9-7-87; discvy c/off by 9-31-87; all dispositive mtns to be filed by 9-21-87 & resp 15 days t/a; req jury instructions to be submitted by 10-9-87; trial brfs to be

DATE	NR.	PROCEEDINGS
		filed by 10-9-87; final PT order to be subm to Ct by 10-1-87; all exhs intended to be offered to be premarked at least 5 days before trial; *Jury Trial sch for Oct 19, 1987 at 9:30 am* (BOHANON)kb
06-04-87	13	APPEARANCE of Jack Dawson as cnsl for plf
06-04-87	14	APPEARANCE of John P. Roberts & Eric S. Gray as cnsl for dft
06-10-87	15	NOTICE of Deposition, by dft -w/s
7-15-87		RETURN re serv of Subp DT
	16	EXECUTED on Bill Tucker, PPS, 7-14-87
07-13-87	17	NOTICE of Deposition, by dft
07-14-87	18	STIPULATION, by plf & dft
07-16-87	19	CERTIFICATE of Compl W/R.14(E), by plf -w/s
07-16-87	20	MOTION for Protective Order, by plf -w/s
07-17-87	21	PRAECIPE for Subp DT, by dft -w/s
07-17-87	22	NOTICE of Deposition, by dft -w/s
07-20-87	23	RETURN of Serv re Subp DT
		EXECUTED on Jim R. Artman on 7-17-87, by PPS
07-20-87	24	NOTICE of Deposition, by dft
07-20-87	25	PRAECIPE for Subp Dt, by dft
07-20-87	26	RESPONSE & Obj to Plf's Mtn for Protective Order & Brf in Supp Thereof, by dft -w/s
07-23-87	27	APPEARANCE of Janice M. Dansby as co-cnsl for plf
07-22-87	28	PRAECIPE For Subp Dt, by dft

DATE	NR.	PROCEEDINGS
07-22-87	29	NOTICE of Deposition, by dft -w/s
07-22-87	30	PRAECIPE for Subp Dt, by dft
07-22-87	31	NOTICE of Deposition, by dft -w/s
07-22-87	32	PRAECIPE for Subp DT, by dft -w/s
07-22-87	33	NOTICE of Deposition, by dft
07-23-87	34	REPLY Brf of Plf to Dft's Resp & Obj to Plf's Mtn for Plf's Mtn for Protective Order -w/s
07-23-87	35	HEARING: plf's Mtn for Protective Order is denied (BOHANON) kb
07-23-87	36	APPEARANCE of Linda J. Burgess as co-cnsl for dft
07-23-87	37	NOTICE of Deposition, by dft
07-23-87	38	PRAECIPE for & issd Subp DT, by dft
7-30-87	39	PRAECIPE for & issd subp DT, by dft
7-30-87	40	PRAECIPE for & issd subp DT, by dft
7-30-87	41	PRAECIPE for & issd subp DT, by dft
7-30-87	42	PRAECIPE for & issd subp DT, by dft
7-30-87	43	NOTICE of Depo of Custodian of Records for FDIC, Rcvr for Sec Natl Bank of Norman OK, by dft Invstrs Mrtg Ins Co -w/s
7-30-87	44	NOTICE of Depo of Custodian of Records for FDIC, Rcvr for Norman Bank of Commerce, by dft Invstrs Mrtg Co -w/s
7-30-87	45	NOTICE to Take Depo of Custodian of Records for FDIC, Rcvr for 1st Natl Bank & Trust Co of Norman, by

DATE	NR.	PROCEEDINGS
		dft -w/s
7-30-87	46	NOTICE to Take Depo of Custodian of Records for FDIC, Rcvr of Bank of Newcastle, by dft -w/s
7-31-87		RETURN re serv of subp DT
	47	EXECUTED on Custodian of Records FDIC, Rcvr for 1st Natl Bank of Commerce, 7-31-87, PPS
	48	EXECUTED on Custodian of Records FDIC, Rcvr for 1st Natl Bank & Trust Co of Norman, 7-31-87, PPS
	49	EXECUTED on Custodian of Records FDIC, Rcvr for Sec Natl Bank, 7-31-87, PPS
	50	EXECUTED on Custodian of Records FDIC, Rcvr Bank of Newcastle, 7-31-87, PPS
8-10-87	51	NOTICE of Depo of Henry M Staat, by dft -w/s
8-10-87	52	PRAECIPE for Subp DT, by dft -w/s
8-10-87	53	NOTICE of Depo of Janice Staat, by dft -w/s
8-10-87	54	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	55	NOTICE of Depo of Don Armstrong, by dft -w/s
8-10-87	56	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	57	NOTICE of Depo of Charles O. Wolfes, by dft -w/s
8-10-87	58	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	59	NOTICE of Depo of Mary Ann

DATE	NR.	PROCEEDINGS
		Wolfes, by dft -w/s
8-10-87	60	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	61	NOTICE of Depo of Keith Busking, by dft -w/s
8-10-87	62	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	63	NOTICE of Depo of Paul Busking, by dft -w/s
8-10-87	64	PRAECIPE for & issd Subp DT, by dft -w/s
8-10-87	65	NOTICE of Depo of Glenda Largent, by dft -w/s
8-10-87	66	PRAECIPE for & issd Subp DT, by dft -w/s
8-10-87	67	PRAECIPE for & issd Subp DT, by dft -w/s
8-10-87	68	NOTICE of Depo of Parke Largent -w/s
8-12-87		RETURN re serv of subp DT
	69	EXECUTED on Janice Staat, PPS, 8-11-87
	70	EXECUTED on Henry Staat, by serv Janice Staat, PPS, 8-11-87
	71	EXECUTED on Paula K. Bushing, PPS, 8-11-87
	72	EXECUTED on Charles Wolfes, PPS, 8-11-87
	73	EXECUTED on Mary Ann Wolfes, by serv Charles Wolfes, PPS, 8-11-87
	74	EXECUTED on Parke Largent, by serv Glenda Largent, PPS, 8-11-87

DATE	NR.	PROCEEDINGS
	75	EXECUTED on Glenda Largent, PPS, 8-11-87
8-14-87		RETURN re serv of subp DT
	76	EXECUTED on Keith Busking, PPS, 8-14-87
	77	EXECUTED on Don Armstrong, PPS, 8-14-87
8-17-87	78	PLAINTIFF'S & Dft's Joint Applctn for Ext of Deadlines -w/s
8-18-87	79	ORDER all dates ent at status conf of 6-4-87 ext 2 mos (BOHANON) ap
8-25-87	80	NOTICE of Depo of Larry Busking, by dft -w/s
9-1-87		*JURY DOCKET: Mon, 10-19-87, 9:30 am* (BOHANON) ap
9-2-87	81	ENTER ORDER striking Jury trial Oct 19 & resetting to the January 19, 1988 Trial Docket. (BOHANON) ap
9-3-87	82	PRAECIPE for & issd Subp DT, by dft
9-3-87	83	NOTICE of Depo, of Cust of Records for Sooner Fed S&L, by dft -w/s
10-13-87	84	NOTICE of Depo of Custodian of Records for City Natl Bank & Trust Co, by dft -w/s
10-28-87	85	PLAINTIFF'S & Dft's Joint Applctn for Ext of Time -w/s
10-29-87	86	ORDER deadlines ext to wits & exh lists 2-7-88; disco & dispos mtns 2-21-88; final PT ord 3-1-88; rspns to dispos mtns 3-6-88; req jury instrucs, voir dire & trial brfs 3-9-88; trial set 4-25-88 (BOHANON) ap
12-16-87	87	NOTICE of Change of Address by

DATE	NR	PROCEEDINGS
		cnsl for dft -w/s
2-3-88	88	JOINT Applctn for Ext of deadlines, by ptys
2-4-88	89	ORDER ext deadlines; ptys exch wits & exh lists 3-7-88; disco & dispos mtns 3-21-88; final PT Ord 4-1-88; rspns to dispo mtns 4-6-88; req jury instrucs, voir dire ques, trial brfs 4-9-88; trial date 4-25-88 (BOHANON) td
2-22-88	90	NOTICE to Take Depo of plf, by dft -w/s
2-22-88	91	NOTICE to Take Depo of plf, by dft -w/s
2-22-88	92	NOTICE to Take Depo of plf, by dft -w/s
3-2-88	93	JOINT Application for Ext of Deadline to Subm Wit & Exh Lists -w/s
3-8-88	94	PRAECIPE for & issd 1 subp, by dft
3-8-88	95	NOTICE of Depo of Bill Tucker, by dft -w/s
3-9-88	96	NOTICE of Depo of plf, by dft -w/s
3-9-88	97	NOTICE of Depo of plf, by dft -w/s
3-9-88	98	NOTICE of Depo of plf, by dft -w/s
3-9-88	99	ORDER ext deadline to subm wit & exh lists to 3-24-88 (BOHANON) ap
3-11-88		RETURN re serv of subp
	100	EXECUTED on Bill Tucker, PPS, 3-9-88
3-18-88	101	DEFENDANT'S Applctn for Ext of Deadlines -w/s
3-21-88	102	OBJECTION to dft's Applctn for Ext of Deadlines -w/s

DATE	NR.	PROCEEDINGS
3-21-88	103	ORDER grtg ext of deadlines: ptys exch wit & exh lists 5-23-88; disc & dispos mtns 5-20-88; final PT Ord 5-31-88; rspns to dispo mtns 6-5-88; req jury instrucs, voir dire & trial brfs 6-8-88; jury trial dkt 6-27-88 (BOHANON) ap
3-30-88	104	NOTICE of depo of Darlene Dawson, by dft -w/s
3-30-88	105	PRAECIPE for & issd 1 subp, by dft
4-01-88	106	DEFENDANT'S Mtn for SJ -w/s (Bound)
4-01-88	107	DEFENDANT'S Brf in Supp of Mtn for SJ -w/s (Bound)
4-05-88		RETURN re serv of subp
	108	EXECUTED on Darlene Dawson, PPS, 3-31-88
4-15-88	109	APPLICATION for Ext of Time to File Rspns to dft's Mtn SJ, by plf -w/s
4-18-88	110	ORDER FirsTier Mrtg Co grtd til 5-2-88 to rspnd to dft's Mtn SJ (BOHANON) ap
4-27-88	111	PLAINTIFF'S Mtn for Lv of Ct to File Partial Rspns to dft's Mtn for SJ & to Suspend Time to Completely Rspnd -w/s
4-29-88	112	ORDER plf grtd lv to partially rspnd to dft's Mtn SJ; time to completely rspnd to dft's Mtn SJ suspended til fur order of Ct; following brfg of iss by cnsl, Ct will set for oral arg; if plf wishes to file reply brf, file req to do so w/Ct (BOHANON) ap
4-29-88	113	APPLICATION to Strike Deadlines, or to Stay Deadlines, by dft -ws

DATE	NR.	PROCEEDINGS
5-02-88	114	PLAINTIFF'S Limited Rspns Brf to dft's Mtn SJ -w/s (Bound)
5-3-88	115	NOTICE of Service re mailing cpy of order of 4-28-88 to plf's atty, by dft's cnsl
5-5-88	116	ORDER Sched Conf to be conducted after Ct rules on applicability of 36 O.S. §3609 to this action, the deadlines will be reset (BOHANON) ap
5-16-88	117	APPLICATION for Ext of Time to File Rspns to plf's Limited Rspns to dft's Mtn SJ, by dft -w/s
5-17-88	118	ORDER Investors Mrtg Ins Co trtd til 5-27-88 to rspnd to plf's limited rspns to dft's Mtn SJ (BOHANON) ap
6-08-88	119	LETTER FM CT TO CNSL: SETTL CONF BEF MAG IRWIN, 06-24-88 AT 10:30 AM (BOHANON) fp
6-08-88	120	APPLICATION For Lv Of Ct To Resp To Dft's Resp To Plf's Limited Resp To Dft's Mtn for SJ, by plf, w/s
06-10-88	121	ORDER: Appl of Plf for lv to resp to Dft's Resp to Plf's Limited Resp to Dft's Mtn for SJ is grtd & said Resp is not to exceed 10 pgs in length & shall be filed by 06-17-88 (BOHANON) kb
5-27-88	122	DEFENDANT'S Resp To Plf's Limited Resp To Dft's Mtn for SJ, w/s
6-17-88	123	PLAINTIFF'S Rspns to dft's Rspns to plf's rspns to dft's Mtn SJ -w/s
6-20-88	124	LETTER fm dft to Mag Irwin re rescheduling setlmnt conf to July 22, 1988, 1:00 pm

DATE	NR.	PROCEEDINGS
7-26-88	125	APPLICATION to w/drw as cnsl of record, by Linda Burgess, cnsl for dft -w/s
7-26-88	126	ORDER permitting w/drwl of Linda Burgess, cnsl of record for dft Investors Mrtg Ins Co (BOHANON) ap
09-15-88	127	ORDER It is Ord that partial SJ be GRANTED to the dfts & Plfs be given 15 days to further resp to dft's mtn for SJ (BOHANON) fp (Micro/Sept '88)
9-29-88	128	APPLICATION For Ext of Time to fur resp to Dft's Mtn for SJ, by plf, w/s
9-29-88	129	ORDER: It is ordered that plf is grtd until 10-15-88 to fur resp to Dft's Mtn for SJ (BOHANON) jy
10-13-88	130	APPLICATION For Ext Of Time to fur resp to Dft's mtn for SJ, by plf, w/s
10-14-88	131	ORDER Denying Appl For Ext Of Time: It is ordered that plf's Appl for Ext of Time to resp to dft's Mtn for SJ is denied (BOHANON)
10-17-88	132	PLAINTIFF'S Resp To Dft's Mtn for SJ, w/s (BOUND)
10-17-88	133	BRIEF In Supp Of Plf's Resp To Dft's Mtn For SJ, w/s (BOUND)
10-17-88	134	PLAINTIFF'S Exhs & Depos To Plf's Resp To Dft's Mtn For SJ, Vol. I, (BOUND)
10-17-88	135	PLAINTIFF'S Exhs & Depos To Plf's Resp To Dft's Mtn For SJ, Vol. II, (BOUND)

DATE	NR.	PROCEEDINGS
10-19-88	136	APPLICATION For Lv To File Reply To Plf's Resp To Mtn For SJ, by dft. w/s
10-20-88	137	ORDER Grtg Lv To File Reply: It is ordered that dft is grtd 15 days or until 11-02-88 to file Reply to Plf's Resp to Dft's Mtn for SJ (BOHANON) jy
11-02-88	138	DEFENDANT'S Reply to Plf's Resp to Dft's Mtn For SJ, w/s (BOUND COPY)
11-08-88	139	APPLICATION For Lv To Resp To Dft's Reply To Plf's Resp To Mtn For SJ, by plf, w/s
11-08-88	140	ORDER Grtg Lv To File Resp: It is ordered that plf is grtd 15 days or until 11-17-88 to file Resp not to exceed 20 pgs in length, to Dft's Reply to Plf's Resp to Dft's Mtn for SJ. No fur ext will be grtd (BOHANON) jy
11-17-88	141	RESPONSE to dft's Reply to plf's Rspns to dft's mtn SJ -w/s (bound)
11-23-88	142	APPLICATION for Lv to File Suppl Brf in Supp of Mtn SJ -w/s
11-30-88	143	MOTION to Suppl Rspns, by Firstier -w/s
11-30-88	144	PLAINTIFF'S Objctn to dft's applctn for Lv to File Suppl Brf in Supp of Mtn for SJ or in altrntv Mtn for Lv to file suppl Brf -w/s
12-01-88	145	ORDER plf Firstier Mrtg grtd lv to supplmnt rspns by filing affdvt of Kenneth McBride, Pres of American-First Abstract Co (BOHANON) ap

DATE	NR.	PROCEEDINGS
12-01-88	146	ORDER dft Investors Mrtg Ins Co grtd lv to file supplmntry brf in supp of Mtn SJ; supplmntry brf attached as exh B to dft's applctn for lv to file supplmntry brf in supp of Mtn SJ deemed to be filed on this date (BOHANON) ap
12-01-88	147	SUPPLEMENTARY Brf in Supp of Mtn SJ, by dft -w/s
01-20-89		*HRG ON DFT'S MTN SJ: Thurs, 1-26-89, 11:00 am* (BOHANON) ap
01-26-89	148	HRG ON DFT'S MTN SJ: cnsl apr & Ct hrs oral args fm both sides; Ct advises policy should be &/or cancelled as void for want of fraud, bad faith; no evidence in hrg to hold policy void; dft's cnsl to subm sugg FF&CofL as to ea loan w/i 10 days & send cpy to plf's cnls & plf's cnls to obj or sugg FF&CofL 5 days t/a; Ct will then modify, add to or delete & enter own FF&CofL (BOHANON) ap
2-8-89	149	NOTICE Of Appeal by plf fm ruling ent 1-26-89-w/s #89-6042
2-8-89		RECEIVED $105.00 filing & dktg fees on Appeal. Receipt #78004
2-8-89	150	CLERK'S ltr re serv of Notice of Appeal, w/cpy ltr, notice & dkt sheet as prelim record to CCA & cnsl -sa
02-10-89	151	DEFENDANT'S Applctn for Award of atty's fees & supp brf -w/s
02-13-89	152	FIRSTIER'S Suggested Findings of Fact & Conclusions of Law -w/s
02-13-89	153	OBJECTION to dft's Sugg Findings of Fact & Conclusions of Law, by plf, -w/s

DATE	NR.	PROCEEDINGS
02-10-89		BILL of Costs in amt of $10,213.12 agst Firstier Mrtg Co (hrg set 3-9-89, 9:00 am)
02-24-89	154	ENTRY of Aprnc & Notice of Change of Address, by Eric Gray, prev w/firm of Edwards Roberts & Propester, cnsl of record for dft -w/s
02-24-89	155	PLAINTIFF'S Objctn to dft's Mtn for Atty Fees -w/s
02-24-89	156	PLAINTIFF'S Objctn to dft's Bill of Costs -w/s
02-28-89	157	NOTICE of transc ord (TR not necessary) cc: CCA & cnsl -sa
03-03-89	158	MEMORANDUM Opinion & Order Ct concludes that there is no genuine iss as to any material fact & that IMI entitled to jdgmnt as matter of law; because insurance applications contained misrepresentations that were material to risk assumed by IMI & because Firstier subm ins applications fraudulently & in bad faith, the 8 ins policies at iss in this case are declared void (BOHANON) (ap)
03-03-89	159	ORDER & Judgment consistent w/memo opinion ent, the following policies issed by Investors Mrtg Ins Co to Firstier Mrtg Co are void & are unenforceable: Policy #456987, 456988, 457066, 457078, 457225, 457246, 457247, 457224; jdgmnt is rendered in favor of dft & agst plf (BOHANON) (MICRO-MAR) (ap)
03-08-89	160	ENTER ORDER case set for hrg on dft's Applctn for atty fees on Fri, 4-7-89 at 10:00 am (BOHANON) (alp)

DATE	NR.	PROCEEDINGS
03-08-89		*HEARING ON DFT'S APPLCTN FOR ATTY FEES: FRI, 4-7-89, 10:00 am* (BOHANON) (alp)
03-08-89	161	APPEARANCE of Gregory F. Pilcher, cnsl for dft Investors Mrtg Ins Co.
03-20-89	162	ENTER ORDER case prev set for Hrg on Dft's Applctn for Atty Fees on Fri, 4-7-89 strkn & reset for Thurs, 4-6-89 at 10:00 am (BOHANON) (alp)
03-20-89		*HEARING ON DFT'S APPLCTN FOR ATTY FEES: Thurs, 4-6-89 10:00 am* (BOHANON) (alp)
03-15-89	163	DEFENDANT'S Supplementary Applctn for Award of Atty's Fees & Supp Brf -w/s
03-16-89	164	COSTS Taxed in amt of $5221.40 for dft (CLERK) (MICRO-MAR'89) (alp)
03-27-89	165	MOTION for De Novo Review of Clk's Taxation of Costs & Brf in Supp, by dft -w/s
03-28-89	166	PLAINTIFF'S Objctn to dft's Supplmntry Applctn for Award of Atty's Fees -ws (ap)
04-03-89	167	PRAECIPE for & issd 1 subp, by dft
04-06-89	168	HEARING ON ATTY FEES: cnsl apr; Ct hrs oral args on Mtns; by stipulation, dft w/drws Mtn for Review of taxation of costs; ptys stipulate to atty fees for dfts to be $60,000 if Ct finds Investors Mortgage Ins to be prevailing pty; Mtn for atty fees taken under advisement & Ct to iss formal order (BOHANON)

DATE	NR.	PROCEEDINGS
04-06-89	169	STIPULATION by all ptys, as more fully set out -w/s (ap)
04-06-89	170	ORDER IMI's applctn & suppl applctn for atty's fees grtd in amt of $60,000.00 (BOHANON) (ap)
04-12-89	171	NOTICE Of Appeal by plf fm ord ent 4-6-89-w/s
04-12-89		RECEIVED $105.00 filing & dktg fees on Appeal. Receipt #79456
04-13-89	172	CLERK'S ltr re serv of Notice of Appeal, w/cpy ltr, notice & dkt sheet as prelim record to CCA & cnsl -sa
04-14-89	173	APPLICATION for Ext of Time to File Notice of Appeal, by plf -w/s (ap)
04-14-89	174	ENTER ORDER: dft Investors Mortgage Ins Co ordered to file its rspns to Firstier Mortgage Co's Appl for Ext of Time to File Notice of Appeal by 4-24-89 (BOHANON) (ap)
04-18-89	175	OBJECTION to plf's Appl for Ext of Time to File Notice of Appeal, by dft -ws (ap)
04-20-89	176	APPLICATION for Lv to File Rspns to dft's Objctn to Firstier's Appl for Ext of Time to File Notice of Appeal, by plf -w/s (ap)
04-24-89	177	ORDER Plf Firstier Mortgage Co grtd to 5-1-89 to file Notice of Appeal (BOHANON)
04-24-89	178	NOTICE of transc ord (Dansby) (TR not necessary) cc: CCA & cnsl -sa